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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

FILED WITH
COURT SECURITY OFFICER
Meghan
DATE 13-11-03

UNITED STATES OF AMERICA)	<u>UNDER SEAL</u>
)	
v.)	Criminal No. 01-455-A
)	
ZACARIAS MOUSSAOUI)	

GOVERNMENT'S MOTION TO SUPPLEMENT THE APPELLATE RECORD

Pursuant to Fed. R. App. P. 10(e) and I.O.P. 10(e) of the Local Rules of the Fourth Circuit, the United States respectfully requests the Court to supplement the record for appellate review based on the following:

1. On February 7, 2003, the United States filed a Notice of Appeal seeking interlocutory review of the Court's ruling on January 30, 2003, in which the Court ordered the United States to make [REDACTED] available as a deposition witness, pursuant to Fed. R. Crim. P. 15.

2. Rule 10(e)(2) of the Federal Rules of Appellate Procedure provides:

If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

- (A) on stipulation of the parties;
- (B) by the district court before or after the record has been forwarded; or
- (C) by the court of appeal.

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3. Local Rule 10(e) of the Fourth Circuit's Internal Operating Procedures further provides:

Disputes concerning the accuracy or composition of the record on appeal should be resolved in the trial court in the first instance, although the Court of Appeals has the power, either on motion or of its own accord, to require that the record be corrected or supplemented. It is unnecessary to seek permission of the Court of Appeals to supplement the record and the record may be supplemented by the parties by stipulation or by order of the district court at any time during the appellate process.

For these reasons, the United States has filed this motion in the District Court and respectfully requests the Court to supplement the record for the reasons that follow.

4. As noted in prior pleadings to this Court, [REDACTED] war-time detainees is a fluid, on-going process [REDACTED]. Indeed, it was in recognition of this that the Court required the undersigned to monitor regularly the information [REDACTED]. In compliance with this directive, between October 2, 2002, and January 13, 2003, the prosecutors in this case routinely reviewed [REDACTED] reports [REDACTED] with a particular focus on information he provided regarding the events leading up to the September 11th attacks and the defendant's role in those attacks. Thereafter, the Government prepared summaries of the [REDACTED] reports, which were provided to cleared standby counsel after approval by the Court pursuant to Section 4 of the Classified Information Procedures Act ("CIPA").

5. During the CIPA hearing on January 30, 2003, the Court repeated its earlier order to the prosecution to continue its review of [REDACTED] any statements [REDACTED] about the defendant or September 11. [REDACTED] Such statements, the Court

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noted, should be provided to cleared standby counsel so that they could prepare for the deposition. (*Id.*). Thus, in further compliance with the Court's orders, the prosecution has continued its review of the relevant reports and has prepared summaries [REDACTED] for disclosure to cleared standby counsel. (Bates Numbers 195 - 223). On March 7, 2003, these summaries were submitted to the Court for *ex parte* review for a determination under Section 4 of CIPA that they may be provided to cleared standby counsel. On March 10, 2003, the Court approved the disclosure of the summaries, [REDACTED] to cleared standby counsel. (These summaries also are attached hereto in Tab A for the Court's convenience).

6. As is clear from a review of these recent summaries, [REDACTED] [REDACTED] information about the events leading up to the September 11th attacks, and the defendant's role in those attacks. [REDACTED]
[REDACTED]
[REDACTED] In short, this updated information provides a more complete picture [REDACTED]
[REDACTED] about the planning and execution of the September 11th attacks, and the defendant's role in these attacks. As such, these summaries will aid the parties in preparing for the interlocutory appeal, and more importantly, will assist the Fourth Circuit in its review of the issues on appeal. Therefore, because this material was not available at the time of the hearing before Court, and is directly relevant to the issues on appeal, the United States respectfully submits that the record should be supplemented with the inclusion of the attached summaries. See United States v. Custis, 988 F.2d 1355, 1363 fn. 3 (4th Cir. 1993) (Court granted motion to supplement record with order issued by state court while appeal

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pending); United States v. Joseph, 914 F.2d 780, 783 fn. 2 (6th Cir. 1990) (district court properly supplemented record pursuant to Rule 10(e) with a ruling issued after the filing of the notice of appeal because the ruling was helpful for consideration of the appeal).

7. Pursuant to Local Rule 27(b) of the Fourth Circuit's Internal Operating Procedures, the undersigned informed Standby Counsel Frank Dunham of the intended filing of this motion. Mr. Dunham stated that, on behalf of standby counsel, he would have no position until he has reviewed the summaries.

Respectfully submitted,

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By:

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Certificate of Service

I certify that on the 11th day of March, 2003, a copy of the foregoing pleading was provided to the following through the Court's Security Officer:

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Tabs A (Classified Summaries)